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In the Supreme Court of the United States

OCTOBER TERM 1971

No. 71-1089

CALIFORNIA SHIPPING CO., INC. and
FRED F. NOONAN CO., INC., *Petitioners*

vs.

PACIFIC FAR EAST LINE, INC., and
UNITED STATES LINES, CO., *Respondents*

Brief of Respondent Pacific Far East Line, Inc. in Opposition to Petition for a Writ of Certiorari

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STATEMENT OF THE CASE

Petitioners allege that negotiations for the sale of a ship by one of the respondents to petitioners, which commenced December 8, 1967, were suspended because of a conspiracy between respondents; that on resumption of negotiations some days later agreement was reached on a price of $385,000.00 but that the sale could not be consummated because the United States Maritime Administration (MARAD), whose approval was required under the seller's subsidy contract with the government, disapproved of the sale price as too low.

Petitioners contend that effective December 21, 1967, certain "guide lines" for freight charges on government cargo were revised upwards, thereby increasing ship values; that had it not been for the temporary suspension of negotiations, the proposed sale for $385,000.00 could have been presented to MARAD prior to this date and would have been approved. However, on a Motion for Summary Judgment brought on by respondents the Courts below found there was no genuine issue as to the fact that even had the request for approval been more timely MARAD still would not have approved, so that inability to consummate the sale was not the result of any alleged conspiracy.

REASONS FOR DENYING THE WRIT

(1) Under Supreme Court Rule 19, "special and important reasons", such as a departure from "the accepted and usual course of judicial proceedings", must exist before a writ will be granted.

The issue here is whether Summary Judgment under FRCP 56 was properly granted. There is no disagreement between counsel and no misunderstanding by the courts below as to the principles which are to govern in applying Rule 56.[1] Both the District Court and the Court of Appeals note in their opinions that Summary Judgments in favor of defendants in anti-trust cases are to be sparingly granted. We thus have a situation where an able trial judge of long experience and three Court of Appeals judges, with a complete understanding of the legal principles to be applied, and after briefing, argument and careful consideration, have

1. Indeed, two of the decisions by this Court cited and relied upon in the Petition, *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 and *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, were cited in the opinion of the Court of Appeals.

all satisfied themselves that the conditions for granting the Summary Judgment have been met. Where is the departure from the "accepted and usual course of judicial proceedings"? What is the "special" or "important" reason why this Court should concern itself with this case any more than hundreds of others?

(2) Under Supreme Court Rule 23(4), failure of petitioner to present the matter "with accuracy" is a reason for denial of the writ.

Petitioner's "Statement of the Case" makes it appear that the approval required as a condition of the sale was that of the Maritime Administration Ship Valuation Committee. In this posture, the testimony of Mr. Aptaker, a MARAD official, (that the sale would not have been approved even if the request for approval had been presented earlier) is characterized as "hypothetical" and "opinion". However, as both Courts below noted, approval of the sale was the responsibility of Mr. Aptaker himself, not of the Committee. Following are pertinent excerpts from Judge Wollenberg's Opinion:

> "The MARAD officer whose duty it was to pass upon proposed vessel sales of this sort was Mr. Edward Aptaker, Chief of the Office of Government Aids . . . it was Mr. Aptaker, and Mr. Aptaker alone, who would have approved or disapproved of the sale . . .
>
> ". . . the only real evidence of what MARAD would do is the testimony of the man to whom this decision was delegated, i.e., Mr. Aptaker . . ."

Following are excerpts from the Opinion of the Court of Appeals:

> ". . . The MARAD officer, whose duty it was to pass upon proposed sales, when asked . . . whether the sale . . . would have been approved at the proposed price . . . answered 'No' . . . appellants presented no evidence to the contrary."

"... the only substantive evidence on the subject is the testimony of the man who made the decision, that is, Mr. Aptaker."

CONCLUSION

The writ should be denied.

Dated at San Francisco this 17 day of March, 1972.

Respectfully submitted,

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Pacific Far East Line, Inc.,
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